Nos. 06-888 and 06-1100

In the Supreme Court of the United States

CORAL POWER, L.L.C., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA EX REL. EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, ET AL.

STATE OF CALIFORNIA EX REL. EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, PETITIONER

v.

CORAL POWER L.L.C., ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN S. MOOT
General Counsel

ROBERT H. SOLOMON
Solicitor

LONA T. PERRY
Senior Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission has statutory authority to assess refunds of payments made under market-based rate tariffs for electricity, where the sellers have failed to comply with the reporting requirements associated with market-based rate tariffs.

2. Whether the Federal Energy Regulatory Commission's market-based rate program is consistent with the Federal Power Act, 16 U.S.C. 791a *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 383 F.3d 1006.[1] The orders of the Fed-

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 06-888.

eral Energy Regulatory Commission (Pet. App. 20a-60a, 61a-79a) are reported at 99 F.E.R.C. ¶ 61,247, and 100 F.E.R.C. ¶ 61,295.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2004. A petition for rehearing was denied on July 31, 2006 (Pet. App. 80a-81a). On October 23, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 28, 2006, and the petition in No. 06-888 was filed on that date. The petition was placed on the docket on January 4, 2007, and a conditional cross-petition for a writ of certiorari in No. 06-1100 was filed on February 5, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1).

Proposed rates for the sale or transmission of power within FERC's jurisdiction are subject to FERC review to ensure that they are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). To this end, the FPA provides that, "[u]nder such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." 16 U.S.C. 824d(c).

FERC may suspend a proposed rate for up to five months pending an investigation of its lawfulness. See 16 U.S.C. 824d(e) If no decision is reached by the end of the suspension period, the proposed rate will go into effect, but it may be placed into effect subject to refund. See *ibid.*

If, after a hearing—either on its own motion or based on a complaint—FERC determines that any existing rate or charge is unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." 16 U.S.C. 824e(a). FERC also may "order the [seller] to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate." 16 U.S.C. 824e(b). At the time of the proceeding at issue here, the "refund effective date" could be no earlier than 60 days after a complaint was filed or 60 days after publication of the Commission's intent to initiate a proceeding on its own motion. *Ibid.*[2]

FERC also has the general authority "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter." 16 U.S.C. 825h. Invoking that power, the Commission may determine remedies for violations of tariffs, including the award of disgorgement (*i.e.*, re-

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[2] The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, amended the FPA to give FERC an additional 60 days of refund authority. The "refund effective date" is now the date on which the complaint was filed or on which the Commission announced its intent to initiate a proceeding on its own motion. See *id.* § 1285, 119 Stat. 980 (to be codified at 16 U.S.C. 824e(b) (Supp. V 2005)).

funds) of unjust profits. See *Consolidated Edison Co. of N.Y., Inc.* v. *FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003); *Town of Concord* v. *FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992).

2. Until the 1980s, the Commission established rates primarily on a cost-of-service basis. As barriers to entry in the generation sector declined, however, a competitive market for wholesale sales of electricity began to develop. In response to those developments, the Commission began considering and approving market-based rates for wholesale electricity sales in the late 1980s.

Under the Commission's market-based rate program, the Commission approves a seller's request to sell electricity at market-based rates only if it first finds that the seller and its affiliates either do not have market power or have adequately mitigated their market power. Pet. App. 9a-10a. Market power is defined as a seller's ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time." *Id.* at 10a n.4 (quoting *Citizens Power & Light Corp.*, 48 F.E.R.C. ¶ 61,210, at 61,777 (1989)). The Commission's approach is designed to assure just and reasonable rates because in "a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable." *Id.* at 10a (quoting *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

In order to ensure that the Commission can monitor, on a continuing basis, that market-based rates remain just and reasonable and that the markets are not subject to manipulation, the Commission also imposes ongoing quarterly reporting requirements for market transactions. Pet. App. 10a-11a. The quarterly reporting re-

quirement provides a means for the Commission and the public to spot pricing trends or discriminatory patterns that might suggest the exercise of market power. *Id.* at 42a. For each purchase and sale contract, marketers are required to report the buyer's or seller's name, a description of the service, the delivery point for the service, the price, the quantities to be served or purchased, the contract's duration, and any other attributes of the product being purchased or sold that contribute to its market value. *Id.* at 49a.

After-the-fact reporting allows the market to operate initially without regulatory intrusion, avoiding the costs that would be associated with prospective review of a large number of transactions, many of which are of short duration. Pet. App. 46a. At the same time, the reporting requirement provides the Commission with information with which it can monitor and oversee the rates being charged, and it places sellers on notice that their transactions will be subject to review and, if necessary, to remedial action, including the possible revocation of their market-based rate authorization. *Ibid.* Further, upon finding a tariff violation, the Commission may take retroactive action, including ordering the disgorgement of unjust profits. *Id.* at 76a.

3. In 1995, in response to retail electricity rates that were well above the national average, California comprehensively restructured its electric energy industry. At that time, the major traditional investor-owned utilities were vertically integrated; that is, they owned generating resources, transmission lines, and distribution facilities. Pet. App. 2a & n.2. Under the restructuring, those utilities were required to divest most of their generating assets and to purchase power at market-based rates through an independent power exchange, which

organized the wholesale market, and an independent system operator, which managed the transmission network. Most (but not all) wholesale sellers participating in the organized markets were public utilities that were required to obtain market-based rate authorization from the Commission, and all sellers participating in the organized markets were subject to FERC-approved market rules governing the power exchange and the transmission-system operator. See generally *Public Util. Dist. No. 1* v. *Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758-759 (9th Cir. 2004), cert. denied, 545 U.S. 1149 (2005); see also *California ex rel. Lockyer* v. *Dynegy, Inc.*, 375 F.3d 831, 835-836 (9th Cir. 2004), cert. denied, 544 U.S. 974 (2005).

As part of California's restructuring plan, in 1996, California's three major investor-owned utilities filed applications with FERC seeking authority to sell electric energy at wholesale at market-based rates. In accordance with its established policy, FERC approved their requests for market-based rate authority after finding that the companies and their affiliates either did not have, or had adequately mitigated, market power. See, *e.g.*, *Pacific Gas & Elec. Co.*, 81 F.E.R.C. ¶ 61,122, at 61,437, 61,537, 61,572 (1997). FERC also reviewed and approved applications by other wholesale generators and suppliers that lacked, or had adequately mitigated, market power to sell electric energy at market-based rates in the California markets.

For several years, the restructured California electricity markets operated largely as intended. Starting in the summer of 2000, however, wholesale electricity prices in California increased significantly; utilities incurred billions of dollars in debt; and the independent system operator declared dozens of system emergencies

and occasional rolling blackouts. See generally *In re California Power Exch. Corp.*, 245 F.3d 1110, 1115 (9th Cir. 2001).

Acting in response to a complaint filed on August 2, 2000, FERC took steps to remedy that situation. Specifically, it implemented structural and pricing reforms to make California and Western electricity markets more stable and less susceptible to price spikes. See, *e.g.*, *California Power Exch. Corp.*, 245 F.3d at 1114-1116; *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,294, at 61,983 (2000). As a result of these measures and other factors, by early June 2001, prices in California spot and forward markets fell back to preexisting competitive levels. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 95 F.E.R.C. ¶ 61,418, at 62,546 (2001).

FERC also established a proceeding (the Refund Proceeding) to determine refunds owed by suppliers in the California spot markets for sales at unjust and unreasonable rates. See generally *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 96 F.E.R.C. ¶ 61,120 (2001) (*San Diego*). See also *Public Utils. Comm'n* v. *FERC*, 462 F.3d 1027 (9th Cir. 2006); *Bonneville Power Admin.* v. *FERC*, 422 F.3d 908 (9th Cir. 2005). At the time, the statute established the earliest refund date as 60 days following the filing of a complaint with FERC, so the Commission began the refund period as of October 2, 2000. See 16 U.S.C. 824e(b); see also note 2, *supra*. FERC has the authority to direct additional remedies—including the disgorgement of profits—for tariff violations occurring during any time period. But at the time the Refund Proceeding was established, the Commission found that no violation of sellers' market-based rate tariffs had yet been demon-

strated. See, *e.g.*, *San Diego*, 96 F.E.R.C. at 61,507-61,508; see also FERC: *Report to Congress, The Commission's Response to the California Electricity Crisis and Timeline for Distributions of Refunds* at 9-11, 20-26 (2005) <http://www.ferc.gov/legal/staff-reports/comm-response. pdf> (*Report to Congress*) (discussing conduct of Refund Proceeding and providing estimated timeline for completion of distribution of refunds); *Public Utils. Comm'n* v. *FERC*, No. 01-71934 (9th Cir.) (appeals of FERC orders computing specific refunds).

In early 2002, after uncovering evidence that one market participant, Enron, had abused its market-based pricing authority, FERC initiated a separate, broad-based investigation into whether any entity manipulated short-term prices in Western energy markets during the period beginning January 1, 2000. See *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 F.E.R.C. ¶ 61,165 (2002). FERC staff obtained data from all segments of the industry and identified instances of alleged market-power abuses and tariff violations. Based on the staff's findings, the Commission initiated several formal proceedings to examine instances of potential wrongdoing and to take appropriate remedial action, regardless of when the wrongdoing occurred. See, *e.g.*, *American Elec. Power Serv. Corp.*, 103 F.E.R.C. ¶ 61,345 (2003) (initiation of show-cause proceedings on possible gaming and anomalous market behavior), reh'g denied, 106 F.E.R.C. ¶ 61,020 (2004), appeals pending *sub nom. Pacific Gas & Elec. Co.* v. *FERC*, No. 05-71008 (9th Cir. filed Feb. 25, 2005) (in abeyance).

FERC subsequently has approved or facilitated numerous settlements providing for over $6 billion in refunds for alleged market manipulation or excessive

rates in the West during 2000 and 2001. See *Report to Congress* 13-20. Efforts are still underway to negotiate settlements of the remaining disputes. See *Public Utils. Comm'n* v. *FERC*, No. 01-71051 (9th Cir. Feb. 16, 2007) (order noting that "settlement efforts are continuing" and directing court mediator to "continue overseeing and exploring with the parties possible resolution through mediation").

4. In the proceeding below, the State of California filed a complaint with FERC alleging that the Commission's market-based rate filing requirements violate the FPA. Pet App. 20a-79a. California also alleged that even if the Commission's market-based rate requirements are valid, the quarterly reports actually filed by generators and marketers selling into certain California markets during the 2000-2001 energy crisis did not contain required transaction-specific information. *Ibid.*

The Commission granted the complaint in part, finding that those quarterly filings that reported aggregated, rather than transaction-specific, data did not comply with 16 U.S.C. 824d(c), or with the Commission's after-the-fact reporting requirements. In particular, the Commission determined that energy suppliers Williams, Dynegy, Mirant, and Reliant, and perhaps other suppliers, failed to comply with the Commission's reporting requirements for the fourth quarter of 2000 and all four quarters of 2001. Pet. App. 50a-51a. To cure the non-compliance, the Commission directed marketers and other public utility sellers to re-file past reports and to file all future reports to show non-aggregated data. *Id.* at 51a.

The Commission denied California's request for refunds, finding that the failure to report transactions in the proper format was "essentially a compliance issue,"

and that "the sellers' re-filing of quarterly reports to include transaction-specific data is an appropriate and sufficient remedy." Pet. App. 53a-54a. FERC also noted that 16 U.S.C. 824e permits it to institute a refund proceeding only for the refund effective period, commencing after the filing of a complaint or the initiation of a refund proceeding on the Commission's own motion. Pet. App. 52a. Thus, the Commission found that it was precluded from ordering refunds for transactions prior to the date California filed its complaint—that is, March 16, 2002. *Ibid.* California argued that retroactive refunds were permissible because the reporting deficiencies meant, in effect, that no rates were lawfully on file. The Commission rejected that theory, concluding that the tariffs authorizing market-based rates—and not the quarterly reports required by FERC's rules—constituted the filed rate. *Id.* at 53a.

5. The court of appeals granted California's petition for review in part, denied it in part, and remanded the case to FERC for further proceedings. Pet. App. 1a-19a.

The court held that the Commission's market-based rate program generally satisfied the notice and filing requirements of 16 U.S.C. 824d, because it included "the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements." Pet App. 11a. In so holding, the court distinguished the Commission's market-based rate program from market-based rate programs previously administered by the Federal Communications Commission and the Interstate Commerce Commission, which were set aside by this Court. *Id.* at 10a (citing *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497

U.S. 116 (1990)). The court explained that those programs "relied on market forces alone," whereas the Commission conducted both before-the-fact and after-the-fact review of market conditions "to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." Pet. App. 10a-11a.

As to the years and markets in question, however, the court observed that "non-compliance with FERC's reporting requirements was rampant" and the Commission consequently lacked the information necessary for effective after-the-fact monitoring. Pet. App. 12a. Accordingly, the Commission's "ability to monitor the market, or gauge the 'just and reasonable' nature of the rates [was] eliminated," *id.* at 15a, at a time when "the California energy market was subjected to artificial manipulation on a massive scale." *Id.* at 13a.

The court rejected the Commission's position that it lacked authority, under those circumstances, to order refunds retroactively based on reporting failures. Pet. App. 14a. Instead, it held that "FERC possesses broad remedial authority to address anti-competitive behavior." *Ibid.* As "the reporting requirements were an integral part of a market-based tariff," *id.* at 15a, the court determined that FERC possessed the authority to order retroactive refunds to address violations of the tariff. "The power to order retroactive refunds when a company's non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC's authority to approve a market-based tariff in the first instance." *Ibid.*

The court declined to order refunds itself, noting that "[i]t is more appropriate for FERC to reconsider its remedial options in the first instance." Pet. App. 18a. It emphasized that the Commission, on remand, "may elect

not to exercise its remedial discretion by requiring refunds." *Id.* at 15a.

ARGUMENT

Petitioners contend (Pet. 16-30) that the court of appeals expanded FERC's remedial authority under 16 U.S.C. 824d. Petitioners are incorrect. In fact, the court simply applied the Commission's well-established statutory authority to order appropriate relief, including refunds, when a seller has violated the terms of a tariff. The court's antecedent determination—that a tariff violation occurred in this case—does not conflict with any decision of this Court or any other court of appeals. Nor does the case have the practical significance that petitioners suggest (Pet. 26-30). The court of appeals did not order any particular remedy, but simply remanded to allow FERC to exercise its discretion. The interlocutory posture of the case makes this Court's review inappropriate at this time.

1. Petitioners' arguments rest on the erroneous premise that the court of appeals expanded FERC's statutory authority in holding "that [16 U.S.C. 824d] authorizes FERC to order retroactive refunds" for periods before the refund effective date specified in the FPA. Pet. 16. Contrary to petitioners' assertions, the court of appeals did not contravene the FPA in interpreting the Commission's remedial authority. Indeed, the principal issue before the court of appeals was not the interpretation of the FPA—it is well-established that FERC has statutory authority to order retroactive remedies for tariff and filed-rate violations. The issue before the court of appeals was simply whether such violations occurred during the California energy crisis.

FERC's authority to remedy tariff and filed-rate violations derives from its general "power to perform any and all acts * * * it may find necessary or appropriate to carry out" the FPA. 16 U.S.C. 825h. As the D.C. Circuit has recognized, that provision gives the Commission "discretion to determine the remedy for tariff violations," and those remedies "may include refunds." *Consolidated Edison Co. of N.Y., Inc.* v. *FERC*, 347 F.3d 964, 972 (2003). Indeed, FERC "has a 'general policy of granting full refunds' for overcharges." *Ibid.* (quoting *Town of Concord* v. *FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992)); see *Boston Edison Co.* v. *FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (under Section 825h, FERC "can enforce the terms of a filed rate and order refunds for past violations of one"); *Southern Cal. Edison Co.* v. *FERC*, 805 F.2d 1068, 1070-1072 (D.C. Cir. 1986).[3]

In the Refund Proceeding in 2001, the Commission rejected demands for refunds predating the complaint in that case. FERC recognized that it had authority to "take retroactive action" to remedy tariff violations, but it concluded that "it has not been demonstrated that any conditions or limitations of sellers' market-based rate tariffs have been violated." *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 96 F.E.R.C. ¶ 61,120, at 61,507-61,508 (2001). The Commission's orders in this case adopted that analysis in rejecting California's demands for refunds predating its complaint. Pet. App. 52a-54a & n.55 (citing *San Diego*, 96 F.E.R.C.

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[3] Petitioners acknowledge (Pet. 19 n.33) that FERC has authority under Section 825h "to punish a seller's violation of its own tariff," but they object that "no such violations have been proved here." Petitioners did, however, violate the Commission's reporting requirements, and the court of appeals in turn determined that those requirements "were an integral part" of the tariff. Pet. App. 15a.

at 61,[illegible]; Pet. App. 76a & n.25 (citing *San Diego*, 96 F.E.R.C. at 61,507-61,508). The Commission concluded that the reporting violations were essentially "compliance issue[s]" and were not tariff violations (which would implicate the Commission's retroactive remedial authority). Pet. App. 53a, 74a. The Commission distinguished *Washington Water Power Co.*, 83 F.E.R.C. ¶ 61,282 (1998), and *Delmarva Power & Light Co.*, 24 F.E.R.C. ¶ 61,199, opinion modified by 24 F.E.R.C. ¶ 61,380 (1983)—cases in which it had ordered disgorgement of profits—on the ground that those cases involved tariff violations that permitted the Commission to award retroactive refunds. Pet. App. 77a.

The court of appeals disagreed, finding that the post-approval reporting requirement is a critical aspect of the market-based rate tariff itself. Pet. App. 12a-13a; see *id.* at 14a (noting "the integral nature of the reporting requirements to an effective market-based tariff"). Observing that the reporting requirement was subject to "rampant" non-compliance during the California energy crisis, *id.* at 12a, the court of appeals concluded that the Commission in fact possessed remedial authority, like that exercised in *Washington Water Power* and *Delmarva*, to remedy the tariff violations that the court held had occurred. *Id.* at 14a-15a.

Thus, contrary to petitioners' suggestion (Pet. 16-23), the court of appeals did not expand FERC's refund authority under 16 U.S.C. 824d and 824e. Rather, the key difference between the court of appeals' opinion and the Commission's decision below is that the Commission, unlike the court of appeals, did not equate a violation of its after-the-fact reporting requirement to a violation of the tariff. Only in this respect did the court of appeals find the Commission to have broader authority than the

Commission believed it possessed in the circumstances of the present case. The court of appeals determined that the reporting violation was effectively a violation of the market-based tariff, implicating FERC's authority to remediate a tariff violation whenever it occurred, such as that exercised in *Washington Water Power* and *Delmarva*. Pet. App. 14a-15a; see *Public Utils. Comm'n* v. *FERC*, 462 F.3d 1027, 1048-1049 (9th Cir. 2006) (noting that FERC has recognized, in initiating investigative and enforcement proceedings concerning Enron and other energy suppliers, that it possesses full remedial authority to address tariff violations). That antecedent issue, concerning the elements of the tariffs under which petitioners sold electric power during the relevant period, does not warrant review by this Court.

2. Because the court of appeals did not expand FERC's statutory refund authority, the conflict suggested by petitioners is illusory. Petitioners invoke (Pet. 22-23) this Court's decisions applying the filed-rate doctrine. Those cases hold that the Commission may not order retroactive refunds of payments made under a tariff that has been properly filed. See, *e.g.*, *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). The decision of the court of appeals is consistent with that principle. As explained above, the court simply determined that the sellers had violated the terms of their tariffs. It is undisputed that the Commission has authority to provide redress in that situation.

For the same reason, petitioners err when they suggest (Pet. 24-26) that the decision below conflicts with decisions of other courts of appeals. In particular, the decision of the court of appeals does not "diverge[] from the prevailing rule in the D.C. Circuit." Pet. 25. To the contrary, the D.C. Circuit has recognized—in the very

case on which petitioners principally rely—that FERC may, and generally does, grant full refunds for violations of a tariff. See *Consolidated Edison*, 347 F.3d at 972-973. To the extent that the cases cited by petitioners identified statutory limits on FERC's refund authority, they did not address the situation in which a seller has violated a tariff. See, *e.g.*, *Distrigas of Mass. Corp.* v. *FERC*, 737 F.2d 1208, 1221 (1st Cir. 1984) (Breyer, J.) (discussing "payments made under a rate that was lawful at the time of payment"). And petitioners have identified no decision that conflicts with the court of appeals' determination that the sellers in this case, by violating FERC's reporting requirements, effectively violated their market-based tariffs.

3. Petitioners are similarly mistaken in asserting (Pet. 26) that the decision of the court of appeals is "of enormous practical importance." The court of appeals agreed with California only to the extent that it concluded that "FERC improperly concluded that retroactive refunds were not legally available." Pet. App. 18a. It did not require the Commission to order refunds; instead, it remanded to allow the agency to exercise its discretion. *Ibid.* Indeed, the court explicitly stated that the Commission "may elect *not* to exercise its remedial discretion by requiring refunds." Pet. App. 15a (emphasis added).[4]

Petitioners argue (Pet. 27-28) that retroactive refunds will threaten the growth and competitiveness of

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[4] Petitioners assert that the court of appeals has extended the decision below in a subsequent decision regarding FERC's review of long-term contracts for the sale of electricity. Pet. 29 (citing *Public Util. Dist. No. 1* v. *FERC*, 471 F.3d 1053 (9th Cir. 2006)). But in that case, too, the court merely remanded "to allow FERC the opportunity to review these complaints in the first instance." *Id.* at 1057.

wholesale power markets, chill future investment, and destabilize wholesale electricity markets. Petitioners may present those arguments on remand, and the Commission may take them into account in exercising its remedial discretion. If petitioners are dissatisfied with the Commission's exercise of its discretion, or if they believe that it has exceeded its statutory authority on remand, they will be able to seek judicial review. See 16 U.S.C. 825*l*(b). At present, however, the interlocutory nature of the refund issue makes any review by this Court premature. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).[5]

4. Although opposing the petition for a writ of certiorari, the State of California has filed a conditional cross-petition for a writ of certiorari (No. 06-1100). The cross-petition seeks review of the court of appeals' holding that the Commission's market-based rate program produced valid filed rates in compliance with the prior notice and filing requirements of the FPA. Cross-Pet. 2-12. As California appears to recognize, that issue does not independently warrant this Court's review. The resolution of the issue by the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, even if this Court

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[5] The practical significance of this case is further limited by the improbability that a situation of the seriousness and magnitude of the California energy crisis will recur. See *Report to Congress* 8 (describing the unusual combination of factors that led to the California energy crisis); *Californians for Renewable Energy, Inc.* v. *California Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, 2007 WL 1155627, at * 7 para. 30 (Apr. 19, 2007) (noting that "the 2000-2001 energy crisis in the West" was "an unprecedented situation in which numerous adverse events occurred simultaneously"); see also pp. 23-25, *infra*.

were to grant the principal petition, the conditional cross-petition should be denied.

a. FERC's approval of market-based rates fully complied with the FPA. While 16 U.S.C. 824d(a) requires that "[a]ll rates and charges made * * * shall be just and reasonable," the FPA does not dictate, or even mention, any particular ratemaking methodology to be followed. Thus, the statute grants FERC broad discretion as to how the statute's ratemaking mandate will be satisfied. The market-based rate program represents a reasonable exercise of that discretion.

Contrary to California's contention (Cross-Pet. 5), the market-based rate program does not violate the FPA's filing requirement. The FPA requires that every public utility file with FERC "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission," 16 U.S.C. 824d(c), but it explicitly leaves the timing and form of those filings to FERC's discretion. Public utilities must file "schedules showing all rates and charges" under "such rules and regulations as the Commission may prescribe," and "within such time and in such form as the Commission may designate." *Ibid.*[6] Accordingly, as the court of appeals explained, "so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements for administration of the tariff." Pet. App. 11a.

Nor does the market-based rate program result in utilities filing "no rates at all." Cross-Pet. 10. For the tariff applicable here, the Commission requires sellers

[6] The FPA does not define "schedules," leaving that to FERC's discretion as well. FERC has defined "rate schedule" in its regulations at 18 C.F.R. 35.2(b).

to file quarterly reports detailing, for each individual purchase and sale, the names of the parties, a description of the service, the delivery point of the service, the price charged and quantity provided, the contract duration, and any other attribute of the product being purchased or sold that contributed to its market value. Pet. App. 11a, 49a. That reporting requirement provides a means for the Commission and the public to spot pricing trends or discriminatory patterns that might indicate the exercise of market power. *Id.* at 42a.

California asserts (Cross-Pet. 11-12) that the market-based rate program contravenes 16 U.S.C. 824d(d), which requires that all rates be filed 60 days before service begins, and 16 U.S.C. 824d(e), which permits suspension and investigation of proposed rates before they are charged. But as the court of appeals recognized, "FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with a strict reporting requirement to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." Pet App. 10a-11a. Under the market-based rate regime, the rate change is initiated when an applicant applies for authorization of market-based pricing. At that time, there is an opportunity for a hearing, with the burden of proof on the applicant to show that it lacks, or has adequately mitigated, market power. See generally 18 C.F.R. Pt. 35 (filing requirements and procedures). That investigation fully satisfies 16 U.S.C. 824d(d) and (e). In addition, if an applicant is granted market-based rate authority, then it must file quarterly reports showing transaction-specific data for all transactions. See 18 C.F.R. 35.10b. California asserts (Cross-Pet. 12) that the procedures established by Congress for reviewing

the legality of proposed rates "cannot function properly without advance filing." In contrast to California's view that the after-the-fact reports are per se invalid or insufficient, the court of appeals explained that the reporting requirements are "integral to the [market-based rate] tariff" and that they, together with the Commission's initial approval of market-based rate authority, comply with the FPA's requirements. Pet. App. 16a.

b. California suggests that the decision of the court of appeals is inconsistent with cases holding that the FPA requires that a rate filing specify the "rate itself," and not simply provide that rates will be determined by agreement. Cross-Pet. 5 (citing *Electrical Dist. No. 1* v. *FERC*, 774 F.2d 490, 492-493 (D.C. Cir. 1985) (Scalia, J.)). *Electrical District* resolved a "disagreement over what it means to 'fix' a rate within the meaning of 16 U.S.C. 824e(a)"—not Section 824d(c). 774 F.2d at 492. The D.C. Circuit rejected FERC's "policy of making rates effective as of the date of an order [under 16 U.S.C. 824e] setting forth no more than the basic principles pursuant to which the new rates are to be calculated." *Id.* at 493. *Electrical District* holds only that FERC cannot, in a proceeding under Section 824e, "announce some formula and *later* reveal that the formula was to govern from the date of announcement." *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990). It says nothing about whether FERC can establish rules under Section 824d(c) that permit the filing and approval of market-based rate tariffs.

The other court of appeals cases cited by California are equally inapposite. In *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379-380 (D.C. Cir. 1986) (Scalia, J.), the Interstate Commerce Commission approved a tariff provision under which freight

forwarders could provide services to shippers at unpublished rates determined by averaging prior charges to those shippers. *Id.* at 377-378. The court found that that provision violated 49 U.S.C. 10761(a) (1982), which required that rates be "contained in a tariff," because the agreed-upon average rates would never be published nor filed with the Commission. 793 F.2d at 380. The court noted that Section 10761(a) expressly prohibited the charging of any rate different from the tariffed rate. See *id.* at 379. Here, in contrast, 16 U.S.C. 824d(c) expressly permits sellers to set rates either by tariff or by contract, and the Commission's market-based rate program requires quarterly filings providing details of all transactions.

Similarly, in *Southwestern Bell Corp.* v. *FCC*, 43 F.3d 1515, 1521 (D.C. Cir. 1995), the FCC "adopt[ed] a policy of permitting nondominant common carriers to file a range of rates as opposed to fixed rates showing a schedule of charges." *Id.* at 1517. The court held that the FCC policy violated 47 U.S.C. 203(a), which requires that every common carrier file "schedules showing all charges." 43 F.3d at 1517. That statute requires a specific list of discernible rates, rather than a filing of a range of possible rates. *Id.* at 1521. Here, FERC's quarterly reports require each seller to list the terms of each transaction individually. See Pet. App. 13a (noting the "transaction-specific" nature of the required filings). The transaction-specific data required in FERC's quarterly reports do not constitute a range of rates similar to that rejected in *Southwestern.*

c. California also errs in arguing (Cross-Pet. 7-10) that the decision below is inconsistent with this Court's decisions in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommuni-*

cations Corp. v. *AT&T Co.*, 512 U.S. 218 (1994). The Commission's interconnected program of ex ante findings of no market power, coupled with post-approval reporting requirements, distinguishes the market-based rate program from those at issue in *Maislin* and *MCI*.

Maislin involved an ICC policy that allowed carriers to charge privately negotiated contract rates that differed from the filed tariff rate, were never disclosed to or reviewed by the ICC, and were not subject to challenge for discrimination. 497 U.S. at 132-133. This Court found that the policy violated the filed-rate doctrine. *Id.* at 127. Here, in contrast, market-based sales are made in accordance with a market-based rate umbrella tariff, approved only after FERC determines, in a publicly-noticed proceeding with opportunity for interested parties to protest, that a seller lacks market power. Pet. App. 10a. In addition, FERC's system requires the quarterly filing of the actual rates charged for individual transactions, allowing both FERC and the public to review rates for reasonableness and lack of undue discrimination. *Id.* at 11a. After market-based rate authority is granted, parties can file complaints, or FERC can institute its own proceeding, to challenge market-based rates as unduly discriminatory or unjust or unreasonable, or to question whether the seller has market power.

California's reliance on *MCI* is similarly misplaced. *MCI* rejected an FCC policy that relieved *all* nondominant carriers of *any* requirement to file any of their rates with the agency. This Court found that such wholesale detariffing for nondominant carriers effectively removed all rate regulation where the FCC found competition to exist. 512 U.S. at 231-232. FERC's market-based rate system, by contrast, requires every

seller with market-based rate authority to have on file an umbrella market-rate tariff and to file quarterly reports detailing the specific rates charged for each sale. No detariffing occurs in these circumstances. As the *MCI* Court held, it would not violate the filed-rate doctrine for the FCC to "modify the form, contents, and location of required filings, and [to] defer filing or perhaps even waive it altogether in limited circumstances." *Id.* at 234. That is what FERC did here.

In fact, courts of appeals have recognized that market-based rates are consistent with the requirements of the FPA and cognate statutes. "[W]hen there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result." *Elizabethtown Gas Co.* v. *FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); see *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Cajun Elec. Power Coop., Inc.* v. *FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994). As the court of appeals correctly found, in "a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." Pet. App. 10a (quoting *Tejas*, 908 F.2d at 1004). No court of appeals has held that FERC's approval of a market-based system such as that in California is inconsistent with the FPA's mandates.

d. Since the conduct at issue in the orders here, the Commission has taken additional steps to develop and improve its market monitoring and enforcement mecha-

nisms.[7] These and other actions to promote competitive, transparent, and robust energy markets address the sorts of concerns articulated in California's cross-petition. In addition, the Energy Policy Act of 2005 has given FERC new authority to remedy manipulative be-

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[7] See generally *Californians for Renewable Energy, Inc.*, 2007 WL 1155627, at *7 para. 31 (describing steps taken by the Commission "to ensure that there are appropriate market safeguards in place to prevent a repeat of the California 2000-2001 energy crisis"); see also, *e.g.*, *Revised Public Utility Filing Requirements*, 99 F.E.R.C. ¶ 61,107 (Order No. 2001) (requiring electronic filing of quarterly reports providing transaction-specific data on wholesale power sales) (67 Fed. Reg. 31,044 (2002)), decision clarified by 100 F.E.R.C. ¶ 61,074 (2002); *Order Amending Market-Based Rate Tariffs & Authorizations*, 105 F.E.R.C. ¶ 61,218 (2003) (imposing market behavioral rules in all market-based rate tariffs), decision clarified by 107 F.E.R.C. ¶ 61,175 (2004); *Electric Quarterly Reports*, 105 F.E.R.C. ¶ 61,219 (2003) (revoking market-based rate authority for utilities that failed to meet reporting requirements); *Order Revoking Market-Based Rate Authority, Establishing Hearing and Settlement Judge Procedures, and Terminating Section 206 Proceeding*, 113 F.E.R.C. ¶ 61,124 (2005) (same); *AEP Power Marketing, Inc.*, 107 F.E.R.C. ¶ 61,018 (2004) (adopting new interim generation market-power analysis and mitigation policy); *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, 110 F.E.R.C. ¶ 61,097 (2005) (Order No. 652) (amending regulations to establish a reporting obligation for changes in status that apply to public utilities authorized to make sales at market-based rates) (70 Fed. Reg. 8253 (2005)); *Prohibition of Energy Mkt. Manipulation*, 114 F.E.R.C. ¶ 61,047 (2006) (Order No. 670) (amending Commission regulations to implement new Section 222 of the Federal Power Act, prohibiting the employment of manipulative or deceptive devices or contrivances) (71 Fed. Reg. 4244 (2006)). See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, 115 F.E.R.C. ¶ 61,210 (2006) (notice of proposed rulemaking to revise current standards for market-based rate sales); *Notice of Proposed Rulemaking*, 118 F.E.R.C. ¶ 61,031 (2007) (proposing revised standards of conduct for electric transmission providers).

havior by participants in wholesale electricity markets. See Pub. L. No. 109-58, § 315, 119 Stat. 691 (to be codified at 16 U.S.C. 824v (Supp. V 2005)) (authorizing FERC to prohibit "any manipulative or deceptive device or contrivance" by "any entity" in connection with a FERC-jurisdictional transaction); *id.* § 1284, 119 Stat. 980 (to be codified at 16 U.S.C. 825*o* (Supp. V 2005)) (providing for enhanced civil penalties for willful violations of Part II of the FPA).

Those new statutory provisions and measures instituted by the Commission since the California energy crisis in 2000-2001 also reinforce the conclusion that the remedial issue raised in the principal petition, which arises out of the unique context of that crisis, does not warrant review by this Court, especially at this interlocutory stage of the proceedings.

CONCLUSION

The petition and conditional cross-petition for writs of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JOHN S. MOOT
General Counsel

ROBERT H. SOLOMON
Solicitor

LONA T. PERRY
Senior Attorney
Federal Energy Regulatory Commission

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